

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOSE R. SANCHEZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,760
<b>IBP, INC.</b>	)	
Respondent	)	
Self Insured	)	

**ORDER**

Claimant appealed the January 3, 2001 Award entered by Administrative Law Judge Pamela J. Fuller. The Appeals Board heard oral argument on July 18, 2001.

The Director appointed Stacy Parkinson of Olathe, Kansas, to serve as Appeals Board Member Pro Tem in place of Appeals Board Member Gary M. Korte, who recused himself from this proceeding.

**APPEARANCES**

Robert A. Levy of Garden City, Kansas, appeared on behalf of claimant. Wendel W. Wurst of Garden City, Kansas, appeared on behalf of respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Board considered the August 2, 1999 deposition of Donald Harder, M.D. During oral argument to the Board, the parties agreed that Dr. Harder's testimony is a part of the record.

**ISSUES**

This is a claim for a January 28, 1996 injury which resulted in permanent injury to claimant's low back. In the Award, Judge Fuller found claimant was entitled to an 11 percent permanent partial general disability award based upon the 11 percent functional impairment rating given by Phillip R. Mills, M.D. After the injury, claimant was terminated from an accommodated job with respondent that was paying him a wage comparable to that which he was earning at the time of his injury. Without further elaboration, Judge Fuller concluded that "[c]laimant failed to meet his burden of proof as it relates to a claim for a work disability award."

Claimant contends Judge Fuller erred by failing to consider the evidentiary deposition testimony of Donald Harder, M.D., and in failing to award claimant a work disability for the period of August 30, 1996 through May 15, 1999.

Respondent contends that the ALJ's Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The ALJ's Award sets out findings of fact in some detail. It is not necessary to repeat those findings here. Except as to claimant's impairment of function, the Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

Because a back injury is an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk<sup>1</sup> and Copeland.<sup>2</sup> In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

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<sup>1</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>3</sup>

The question becomes whether claimant made a good faith effort to perform the accommodated job with respondent following his return to work after the injury. If claimant failed to make a good faith effort, or was guilty of misconduct tantamount to a refusal to perform appropriate work as in Foulk, then claimant is precluded from receiving an award based on a work disability.<sup>4</sup> The test remains one of good faith, however, on the part of both claimant and respondent.<sup>5</sup>

Following his injury, claimant returned to work with respondent in an accommodated position. Claimant was terminated on or about September 4, 1996, for misconduct. Respondent's policy provides for termination where an employee accumulates more than three documented incidents of misconduct within a 12 month period. Although claimant disputes the reasonableness of his termination, the record fails to establish that the termination was in bad faith or the result of incidents that were inadequately investigated.<sup>6</sup> Because claimant was terminated for misconduct, the Appeals Board finds that claimant failed to make a good faith effort to perform his accommodated job with respondent. Accordingly, claimant is limited by Ramirez to a permanent partial disability award based upon his impairment of function.

The Board will give equal weight to the 11 percent functional impairment rating by Dr. Mills and the 19 percent rating by Dr. Harder and find claimant has a 15 percent permanent partial disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller, dated January 3, 2001, should be, and is hereby, modified as follows:

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<sup>3</sup> Copeland at 320.

<sup>4</sup> See Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (1999).

<sup>5</sup> See Helmstetter v. Midwest Grain Products, Inc., \_\_\_\_ Kan. App.2d \_\_\_\_, 18 P.3d 987 (2001), and Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

<sup>6</sup> See Ford v. Landoll Corporation, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (2000), and Niesz v. Bill's Dollar Stores, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jose R. Sanchez, and against the respondent, IBP, Inc., for an accidental injury which occurred January 28, 1996 and based upon an average weekly wage of \$508.80 for 9.43 weeks of temporary total disability compensation at the rate of \$326.00 per week or \$3,074.18, followed by 62.25 weeks at the rate of \$326.00 per week or \$20,293.50, for a 15% permanent partial general disability, making a total award of \$23,367.68, and is ordered paid in one lump sum less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert A. Levy, Garden City, KS  
Wendel W. Wurst, Garden City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director